United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2242

ORIGINAL

To be argued by
ALFRED S. JULIEN

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P/S

In The

United States Court of Appeals

For The Second Circuit

NORMAN RICH, SHELDON SCHIFF and HOWARD SCHIFF, as trustees of the West Side Corp. Profit Sharing Plan, SIMON MARGULIES, LOUIS MARGULIES, MARILYN MARGULIES, CHARLES SHURPIN, and LILLIAN SHURPIN, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

vs.

NEW YORK STOCK EXCHANGE, LADENBURG THALMANN & CO., ARTHUR LEVINE, SOL LEIT, ALLEN SOLOMON and JOEL KUBIE,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS

For the Second Circuit

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-against-

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APPELLANTS' REPLY BRIEF

Introduction

The appellants are submitting this brief in reply to the joint brief submitted by the appellees, New York Stock

Exchange and Ladenburg Thalmann & Co. The other defendants in this action have not submitted briefs with respect to this appeal.

Point I

The defendants' contention that there was no dispute as to the material facts on the motion for summary judgment before the court below is totally unsupported.

The defendants concede that their motion for summary judgment before the court below was based solely on the ground that the plaintiffs had no provable damages (appellees brief, 4, JA 28, 30).* The defendants claim however that since the plaintiffs allegedly admitted certain facts during the oral argument of the summary judgment motion before the court below, there were no disputed material facts remaining in the action and the court below properly granted summary judgment to the defendants.

*JA refers to the joint appendix in this action. All references to the transcript of the oral argument before the court below will be indicated by Tr. and a page number. References to depositions which were before the district court and which were made part of the record on appeal will be indicated by the specific deposition and a page number.

The defendants' claim is totally unsupported by the transcript of the oral argument had on the defendants' summary judgment motion before the court below. The defendants' entire argument hinges upon a statement made by Mr. Julien, counsel for the plaintiffs, during the oral argument which referred to an article in the New York Times by one Robert Metz. The defendants refer to the Metz article continuously throughout their brief (appellees brief, 3, 5, 9, 12, 14, 20, 21 and 31) and attempt to give this Court the impression that counsel for the plaintiffs adopted and ratified completely and entirely each and every statement made in the newspaper article by Robert Metz (JA 37).

Fortunately a copy of the transcript of the oral argument before the court below is available. A reading of the transcript readily shows that the defendants' arguments concerning the Metz article are contrived and that the defendants are grasping at straws in an attempt to convince this Court that there was no dispute as to the material facts in this case before the court below.

Counsel for the plaintiffs, Mr. Julien, did refer to the Metz article during the course of the oral argument on the summary judgment motion before the court below and referred to it as "a rather excellent factual background" (transcript 4 and 5). All Mr. Julien referred the court to

the Metz article for was 'a factual background.' Mr. Julien in no way adopted any conclusions or opinions drawn by Mr. Metz in his article (JA 37). The appellees in their brief (12, 20) attempt to convince this Court that Mr. Julien not only accepted the Metz article as being accurate insofar as it provided a factual background for the court below to refer to, and that Mr. Julien likewise adopted Mr. Metz's conclusions and opinions contained in the newspaper article, but go so far as to have this Court believe that Mr. Julien adopted those statements from the article which were not factual and not Metz' opinions, but were portions of the article where Metz was citing the Stock Exchange and setting forth what the Exchange's position was with regard to the transfer of certain large accounts from Weis immediately prior to its liquidation.

Paragraphs 3 and 4 of the Metz article (JA 37) read as follows:

> "The exchange said that, without regard to size, it had suggested transfers in early May when it became apparent that Weis was threatened with failure. The liquidation came on May 24. At that time, Ladenburg Thalman, a house much smaller than the 27-branch, 4002 salesman Weis firm, supposedly got all the transferred accounts, although rumors persist that at least one other house received one or more accounts.

> "The transfers were undertaken in a legitimate effort to reduce customers' margin indebtedness. This, in turn, would reduce Weis's indebtedness in that Weis, like all other brokerage firms, borrowed from banks to finance loans made to customers." (emphasis added)

It is these statements contained in the paragraphs which are specifically labeled by Metz as the contentions of the defendant New York Stock Exchange which the appellees now attempt to have this Court believe (appellees' brief, 12 and 20) were adopted by counsel for the plaintiffs. The defendants' position which it presses in its brief that there were no material issues of fact left for the court below to decide on the summary judgment motion since the plaintiffs' counsel had referred to the Metz article as being 'factually' accurate is frivolous. Plaintiffs' counsel's only purpose in referring to the Metz article was to provide the court with a readily available source and synopsis of the factual background of the Weis liquidation. Plaintiffs' counsel by merely referring to the Metz article cannot reasonably be construed as adopting the Metz article in its entirety, including those portions of the Metz article where Metz specifically indicates that the contentions in the portion following are contentions and statements made by the defendant, New York Stock Exchange.

It is only the defendants' attempt to grasp at straws to justify summary judgment granted by the court below which compels them to misconstrue a single statement made by plaintiffs' counsel which referred to a newspaper article for 'factual' background only and to build their entire brief and contentions about it. The defendants having to resort to this type of tortuous sophistry should make it obvious to this Court that there are no real arguments in the defendants' favor which support their position that there were no material issues of fact remaining for the court below when it decided its motion for summary judgment.

There were material issues of fact before the district court which precluded the district court from properly granting summary judgment to the defendants. Among the issues which involve material questions of facts and precluded a granting of summary judgment to the defendants were the following:

1) Did the Stock Exchange know that Weis Was keeping fraudulent books and records from 1971 on and was in net capital violation for a substantial period of that time?

2) Assuming arguendo that the Stock Exchange did not know in 1971 of Weis' keeping fraudulent books and records and being in net capital violation, when could the Stock Exchange by the exercise of due diligence and by properly carrying out its duties of properly policing and supervising its member firms have discovered what Weis was doing?

3) When the Exchange was admittedly advised by Weis in April 1973 that Weis' books and records were false and that Weis was in net capital violation, did it advise certain privileged large margin accounts to transfer their accounts from Weis to other brokerage firms?

There was absolutely no evidence at all submitted to the district court as to any of the above questions on the defendants' motion for summary judgment based on the defendants' contention that the plaintiffs had not suffered any provable damages. Even the defendants have been unable to substantiate a claim that there were any affidavits or other proper evidence before the court below on the summary judgment motion which answer any of the above questions which

are the crux of this lawsuit. The defendants therefore have resorted to a single statement by plaintiffs' counsel which referred the court below to a newspaper article for 'factual' background as supposedly adopting each and every statement contained in that newspaper article as representing the plaintiffs' position. The Robert Metz article in the New York Times is simply a newspaper article which was appended to the defendants' papers in support of their summary judgment motion based solely on the fact that plaintiffs had no provable damages and referred to by plaintiffs' counsel as a matter of convenience during the oral argument of the summary judgment motion before the court below. The defendants' attempt to convince this Court that the Metz article was somehow submitted to the court by the plaintiffs as an accurate representation of the plaintiffs' claims in this action is frivolous.

Point II

The defendants attempt to make it appear that the plaintiffs were seeking to amend their complaint during the course of the summary judgment motion when in fact the plaintiffs were merely proceeding upon their pending complaint and upon the same theories which they had adopted since the commencement of this action.

The defendants in their brief take the position that the plaintiffs' complaint is limited to the Exchange's conduct following April 1973 when the Exchange was admittedly

advised that a member firm, Weis, was in financial difficulty and in net capital violation. The defendants studiously ignore the plaintiffs' primary contention in this action that the Exchange had failed to properly and adequately supervise and police Weis from 1971 onward and that it was the Exchange's failure to properly discipline and supervise its member firms which permitted Weis to reach a level of financial despair so that a SIPC liquidation would become necessary.

The defendants in their brief (10) dismiss the plaintiffs' primary contention with the statement that the district court found no support for that contention in the plaintiffs' complaint. The defendants then go on to quote plaintiffs' counsel's statements during the oral argument of the summary judgment motion and again ignore plaintiffs' primary contention by the use of an ellipsis. During the oral argument (p. 6) the plaintiffs' counsel stated:

> "Sc, as a result of this capital impairment which had been existing for two years or possibly four (more), in April of 1973, the Stock Exchange is now told that Weis & Company's capitalization is below its capital structure requirements * * *."

This is conveniently avoided by the defendants in their brief

by inserting an ellipsis in place of the plaintiffs' primary contentions in this action.

The plaintiffs' primary cause of action,however, does not cease to exist simply because the defendants consistently attempt to ignore it. The defendants insist that the plaintiffs' complaint only complains about the activities of the Exchange subsequent to April 1973 and does not complain about the Exchange's activities from 1971 to 1973 because the plaintiffs' complaint does not specifically mention 1971.

Based on this, the defendants claim that the plaintiffs attempted during the summary judgement motion to inject a new theory of liability, i.e., the plaintiffs' primary contention, that Weis never would have reached a point where its financial difficulties would have required a SIPC liquidation if the Exchange had properly supervised it between 1971 and 1973. The defendants' contentions have little merit to them. The plaintiffs since the commencement of this action have always complained of the Exchange's failure to supervise since 1971 and not merely for the period following April 1973 when the Exchange admits that it was told by Weis of its financial difficulties. During the deposition of the plaintiff Shurpin, the following colloquy occurred:

"Q Would you look at Defendant-Ladenburg Exhibit 2 for identification. Would you look at allegation 5:

'At all times hereinafter mentioned, Plaintiff, Charles Shurpin, maintained a brokerage account for securities with Weis.'

Is this statement true?

A Yes.

Q Can you tell me what period of time is referred to in that statement?

A Since Weis took over the last company. So I would say since 1971."(emphasis added)

The defendants were thus fully aware that the plaintiffs were complaining of the defendants' action or lack of them since 1971 and not merely since April 1973.

The cases cited by the defendants, Freeman v. Continental Gin Co., 381 F.2d 459 (5th Cir. 1967) and Vine v. Beneficial Finance Co., 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970 (1967), for the proposition that the court below was correct in granting summary judgment for the defendants and should not have permitted the plaintiffs to amend their complaint in this action are totally inapposite and inapplicable. The plaintiffs in this case were not attempting to amend their complaint on the motion for summary judgment. It is the plaintiffs' contention that

the complaint adequately sets out the plaintiffs' primary complaint that the Stock Exchange failed to properly supervise Weis between 1971 and 1973 and that if it had properly supervised Weis, Weis would not have reached the point where its financial difficulties required a SIPC liquidation. It is the defendants' claim that the plaintiffs were attempting to inject a supposedly "new" theory of liability on the motion for summary judgment based upon damages only (JA 43). The court below apparently was misled by the defendants into adopting this position when it granted summary judgment to the defendants. The plaintiffs on this appeal claim that even if the court below had adopted the defendants' position that the plaintiffs' complaint did not complain of the Exchange's activities between 1971 and 1973, both the defendants and the Court were aware that this was the plaintiffs' primary contention at the time the summary judgment motion based on damages only was argued before the court and knowing that, the court should have directed the plaintiffs to amend their complaint so that it would be clear that the plaintiffs' contentions were contained in their complaint. The court should not have granted defendants summary judgment. Rossiter v. Vogel, 134 F.2d 908 (2d Cir. 1943) and Sherman v. Hallbauer, 455 F.2d 1236 (5th Cir. 1972).

Freeman and Vine, supra cited by the defendants are totally inapplicable to our situation. In Freeman, the plaintiff moved to amend its complaint eight months after summary judgment had been granted. In Vine, the plaintiff waited until after the argument of the summary judgment motion to see how he would fare before seeking to amend the complaint. In our case, assuming the defendants' contention is accepted that the plaintiffs' complaint did not clearly spell out a cause of action based upon the defendant Exchange's activities between 1971 and 1973, all of the parties and the court were aware of the plaintiffs' contention before the summary judgment motion was heard by the court. The plaintiffs did not attempt to introduce their claims **seriatim** but clearly advised the defendants and the court what its theories of liability were although the summary judgment motion before the Court was based strictly upon the plaintiffs' alleged lack of provable damages.

The Court in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) stated in language directly applicable to this case:

> "Although respondents object that these particular theories of conspiracy now pressed by petitioners were not alleged with sufficient specificity in their complaint, this suggestion is completely

> without merit. Our modern rules provide for trying cases to serve the ends of justice and require that pleadings 'be so construed as to do substantial justice.' Rule 8(f), Fed.Rules Civ.Proc. The gist of petitioners' cause of action has been clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely on these alternative theories of conspiracy." (at 142)

Similarly, in our case the plaintiffs' cause of action has been clear from the outset and the court at the very most should have requested the plaintiffs to amend their complaint so as to specifically set out 1971 in the complaint. It should not have granted summary judgment to the defendants.

If the court below dismissed the plaintiffs' complaint because it did not consider the complaint as complaining of the Exchange's activities between 1971 and 1973, then the plaintiffs will commence a new and separate action based upon the activities of the Exchange between 1971 and 1973 which will result in a waste of time and effort for all concerned. However, as the matter stands now, if the plaintiff commences a separate action against the Exchange, the Exchange will almost certainly claim that the the plaintiff cannot do so since the court below has already dismissed the plaintiffs' complaint. The

plaintiffs are entitled to a clear mandate as to whether or not the court below considered the plaintiffs' allegations with respect to the defendants' actions between 1971 and 1973. If the court below did consider them, then it clearly erred in granting summary judgment to the defendants. If it did not consider them, this should be clearly set forth so the plaintiffs can commence a separate action based on those allegations.

The defendants contend in their brief (24) that the plaintiffs obviously meant to assert a different claim in this action than they did in their action in a separate case arising out of the same occurence, Rich v. Touche Ross & Co., 74 Civ. 772 (CLB) where plaintiffs specifically complain of Touche Ross' activities between 1971 and 1973 -- that if the plaintiffs' contentions were the same as in the Touche Ross case, then the plaintiffs should have merely joined Touche Ross as a party in this action rather than start a separate action against Touche Ross. The defendants' contention is frivolous. The plaintiffs in both actions complain of the activities of the defendants from 1971 on. The reason a separate action was started was simply a matter of procedural convenience and to avoid a lot of unnecessary motion practice.

During the Shurpin deposition (145) plaintiffs' counsel specifically advised the defendants that the plaintiffs intended to consolidate the Touche Ross action with this action.

Plaintiffs did not attempt to amend their complaint on the summary judgment motion but were merely pressing a claim which they consider to be expressed in the complaint. If the court below felt that a clarification was necessary and the year 1971 should specifically be stated in the plaintiffs' complaint, it should have directed the plaintiffs to amend their complaint and not have granted summary judgment to the defendants.

Point III

> The plaintiffs do not claim that they too, and only they, should have been advised of Weis' financial difficulties by the Exchange, but rather that all of Weis' customers should have been advised of Weis' difficulties and all given the same opportunity to transfer their accounts if they so desired.

The plaintiffs in this case claim that if any of Weis' customers were advised by the Exchange of Weis' financial difficulties and warned to transfer their accounts to other brokerage firms, then all of Weis' customers should

have been given the same notice by the Exchange and the same opportunity to transfer their accounts. The defendants are attempting to convert the plaintiffs' contention into the contention that the Exchange had a duty to warn all of Weis' customers of Weis' financial difficulties and cite Independent Investor Protective League v. New York Stock Exchange, 367 F.Supp. 1376 (S.D.N.Y. 1973), for the proposition that there is no such duty on the part of the Exchange to warn customers of failing brokerage firms of their firm's financial difficulties. The decision in Independent Investor Protective League is totally inapplicable to our case. The plaintiffs are not claiming that the Exchange had a duty to warn customers of Weis' financial difficulties. What the plaintiffs are contending is that once the Exchange decided to advise some of Weis' customers of Weis' financial difficulties so they could transfer their accounts, then the Exchange had a duty to deal even-handedly with all of Weis' customers so that all of Weis' customers would have the oppotunity to transfer their accounts prior to the SIPC liquidation. The Exchange's choice was simply either tell no one or tell everyone. The law clearly states that you cannot tell a chosen few.

What makes this entire transaction even more suspect is that as usual there is always apparently a reason found for

warning the rich and leaving the small investor to carry the burden. Although the Exchange still claims that it has no knowledge that it did not determine which accounts were to be given notice of Weis' financial difficulties so that they could transfer their accounts to other brokerage firms prior to the SIPC liquidation, the Exchange has not set out the names of the accounts which were transferred so that the court could determine whether or not there was any connection between these accounts, the Stock Exchange and the brokerage firms involved. The plaintiffs, of course, have not had an opportunity to conduct discovery and to determine which large accounts were in fact given the opportunity to transfer prior to the SIPC liquidation.

The defendants attempt to have this Court believe that the plaintiffs are claiming that they too, and only they, should have been warned of Weis' financial difficulties is totally misleading. That is not the plaintiffs' contention. The plaintiffs do not contend that they too should have been 'tippees'. What the plaintiffs are contending is that all of Weis' customers should have been told of Weis' financial difficulties if any were told so that all of Weis' customers would have had an equal opportunity to transfer their accounts.

The case of Levine v. Seilon, Inc., 439 F.2d 328 (2d Cir. 1971), cited by the defendants is totally inapplicable to this case. In Levine the plaintiff claimed that he too, and only he, should have been made aware of certain facts. That is not the plaintiffs' contention in this case. Plaintiffs are not contending that in addition to those people who were given notice of Weis' financial difficulties, that they too and only they should have been given such notice. What plaintiffs do claim is that all of Weis' customers were equally entitled to notice of Weis' financial difficulties. The defendants' attempt to convert the plaintiffs' complaint into a situation where the plaintiffs are claiming that they too should have been 'tippees' is totally unsupported by the evidence in this case.

Point IV

The defendants are attempting to divert attention from their own misdeeds by seeking to convince the Court that the plaintiffs' real quarrel is with SIPC or with the Securities and Exchange Commission for failing to enact proper rules.

The defendants take the position that any damages or injuries which were suffered by the plaintiffs were brought about as a result of the actions of the SIPC trustee in delaying

payment to the plaintiffs of the cash and securities in their accounts (appellees'brief, 6, 44).

The plaintiffs in this action are not complaining of the acts of the SIPC trustee. What the plaintiffs are claiming is that if the Exchange had properly supervised and policed Weis, the deterioration of Weis' financial condition to the point where a SIPC liquidation would become necessary would never have occurred. If at a trial of this action the Court finds that it was due to the Exchange's failure to properly carry out its supervisory duties that Weis was permitted to continue in business until its financial condition had deteriorated to the extent that a SIPC liquidation was necessary, then the Exchange is liable to the plaintiffs for any damages which they have suffered.

The defendants' contention (appellees' brief, 27) that the plaintiffs are attemp ting to second-guess the Exchange by their claim that the Exchange should not have permitted certain large margin accounts to be transferred from Weis immediately prior to Weis' liquidation is besides the point and is not the issue in this case. The plaintiffs in this case are not questioning the Exchange's right to attempt in good faith

to save a member firm from failing. What the plaintiffs are contesting in this case is the Exchange's alleged 'good faith' in transfering certain large margin accounts from Weis immediately prior to the SIPC liquidation.

Point V

By the defendants' own admissions the court below had no proper evidentiary material before it upon which it could grant a motion for summary judgment on the merits of this action

The court below had no proper evidentiary material before it upon which it could properly grant a summary judgment motion on the merits of this action. The appellees in their brief (20) state that the court below relied upon three factors in determining that no claim existed: 1) the uncontested facts; 2) the evidence presented in affidavits; and 3) the depositions.

Aside from the Robert Metz article which the defendants contend the plaintiffs adopted in its entirety in an apparent attempt to have their own complaint dismissed, there were no uncontested facts before the court below on the motion for summary judgment. The defendants' motion had been based entirely on the fact that the plaintiffs had no provable

damages and there was no evidence submitted as to the merits of the action. Certain self-serving statements which were contained in the defendants' papers on the motion for summary judgment were not contradicted by the plaintiffs for the simple reason that those statements were irrelevant to a motion based solely upon the ground that the plaintiffs had no provable damages. This should not be construed, as the appellees now attempt to construe it (appellees'brief, 7), that the plaintiffs have conceded the correctness of the Exchange's statement of facts.

Item 2, the affidavits submitted in support of the motion for summary judgment by the defendants, contained no information at all with regard to the merits of the action and both affidavits submitted by the defendants were by counsel for the Exchange and by counsel for SIPC, neither of whom admittedly had any first hand knowledge of the Exchange's activities in supervising Weis between 1971 and 1973 or even of the Exchange's activities regarding Weis after April of 1973 (appellees' brief, 21). There were thus no affidavits at all containing any evidence which the district court could rely upon in granting its motion for summary judgment.

The court below, similarly, had no depositions before it containing any evidence upon which it could base its motion for summary judgment. The only depositions before the Court, aside from the plaintiff's which dealt solely with the subject of damages, was the partial deposition of Robert Bishop, a vice president of the Exchange. The Bishop deposition was incomplete, consisted of a mere 54 pages, had been interrupted for a substantial period of time in order to permit Bishop to keep a prior appointment and was adjourned by agreement of counsel and was unsigned by the deponent. The statement in the appellees' brief (18) that the Bishop deposition was unsigned solely because the defendants had no opportunity to cross-examine, intended to give the impression that the deposition was complete except for purposes of cross-examination is refuted by a letter written by counsel for the Exchange, appended as Exhibit A to the appellants' brief and which states clearly that Bishop is not signing his deposition in view of the fact that the deposition has not been completed.

The court had no uncontested facts, no affidavits by persons with personal knowledge and no depositions before it when it granted the defendants' motion for summary judgment.

The contention in the appellees' brief (18) that the plaintiffs should have objected to this material at the time of the motion and made it clear that the court had no material before it to determine a motion for summary judgment before the motion was decided is absurd. The motion for summary judgment before the court below was based solely on the ground that according to the defendants the plaintiffs had no provable damages. This was strictly a matter of law which could be determined by the district court on the materials it had before it. The court never indicated it was going to consider the merits of the action and the plaintiffs never had any warning that the merits of the action were being heard by the court below until the court below rendered its decision.

The court below erred in rendering summary judgment based solely on inadmissible materials when it had no proper evidentiary materials before it.

Point VI

The Exchange is liable for its failure to properly police the financial responsibility of its member firms

The defendants in their brief take the position that the plaintiffs do not have a cause of action against the Exchange for its failure to properly police Weis unless the

plaintiffs can prove that the Exchange had actually learned of Weis' financial difficulties and then failed to take remedial action (appellees' brief, 29-30). The defendants' position is unsupported by the cases. See Baird v. Franklin 141 F.2d 238 (2d Cir.), cert. denied 323 U.S. 737 (1944); Pettit v. American Stock Exchange, 217 F.Supp.21 (S.D.N.Y. 1963) and the court below in its opinion (JA 130, 133) has also recognized that a cause of action exists against the Exchange for its failure to fulfill its obligations under section 6 of the Securities Exchange Act of 1934 if the Exchange failed to properly police Weiss so that it would learn of any financial difficulties which Weis was involved in. In a letter from Irving M. Pollack, director of the division of trading and markets to Mr. Robert M. Bishop, dated April 20, 1971, Mr. Pollack made it clear that the SEC took the position that the Securities Exchange Act held the Exchange responsible for any damages which might occur because of the Exchange's failure to police the financial responsibility of its member firms. Mr. Pollack stated:

> "The proposed standard subordinated debt agreements provide, among other things, that the creditor agrees that his investment is not made in reliance upon the standing of the member firm as a member of the Exchange, the Exchange surveillance of the member firm's financial

> status, or the firm's compliance with the constitution, rules and practices of the NYSE. These provisions are against public policy and constitute an improper attempt to circumvent the Securities Exchange Act provisions which make the Exchange responsible for policing the financial responsibility of its members and also make the member firm liable for its failure to comply with the federal securities laws and with Exchange rules, constitution and policies." (emphasis added)

The defendant Exchange is clearly responsible if it failed to properly police a member firm and that failure was a cause of the plaintiffs' damages.

Point VII

Other various misrepresentations and misleading statements contained in appellees'brief

It would exceed the page limits permitted by this Court for the plaintiff to point out each misrepresentation and misleading statement made by the appellees in their brief. The following are but a few of the most flagrant examples of misleading statements and misrepresentations contained in the appellees' brief.

On page 22 of the appellees' brief, the appellees give a slanted and distorted history of this action apparently

in order to convey the impression that the plaintiffs are not properly pursuing their action. The defendants claim that between February 6 and April 23, 1974, the plaintiffs conducted no discovery aside from the deposition of Robert Bishop. On February 7 the defendants conducted the deposition of Sheldon Schiff and Charles Shurpin. On February 8, the defendants conducted the deposition of Louis Margulies. Following those depositions, the Exchange moved for rulings as to certain questions objected to by plaintiffs counsel and the matter was referred to Magistrate Raby for pre-trial purposes. The Magistrate did not rule on the various objections until April 2, 1974. Following the Magistrate's rulings, the defendants conducted the deposition of the plaintiff's accountant, continued the deposition of Sheldon Schiff and Charles Shurpin and took the deposition of Norman Rich. Between the date of the Magistrate's rulings and April 23, 1974 when the defendant made its motion for summary judgment on the ground that the plaintiffs had no provable damages, the plaintiff had a maximum of ten working days available during which it could conceivably continue the discovery of the defendant. The defendants' contention that the plaintiff waived discovery is totally unsupported.

Similarly misleading is the defendants' statements concerning the plaintiffs Margulies who discontinued their action against the defendants. The defendants attempt to convey the impr ssion that the Margulies plaintiffs discontinued their action against the defendants because they felt they did not have a valid cause of action. In fact, the plaintiff Simon Margulies is an elderly gentlemen whose account with Weis was one of those which exceeded the SIPC limits and had not been advised by the defendants of Weiss' financial condition prior to the SIPC liquidation. Simon Margulies also managed brokerage accounts for his son and daughter, Louis Margulies and Marilyn Margulies. During his deposition, the defendants badgered Mr. Margulies to the extent that his doctor advised him that it would endanger his health if he continued to partake in depositions and testify at a trial of this action. Accordingly, Margulies was compelled to discontinue his action against the defendants for reasons of health. The defendants are well aware of the Margulies' reasons for discontinuing their action since they are clearly set forth in the affidavit of Stuart A. Schlesinger, one of the attorneys for the plaintiffs in an affidavit accompanying the stipulation of discontinuance. The defendants are also aware that the

stipulation of discontinuance specifically permits the Margulies' to recover as a member of the class if this action is declared a class action by the Court.

The appellees' statements in their brief (3) that the plaintiffs' entire complaint was based on Metz' article in the New York Times and for which they cite the Shurpin deposition (82-85) is directly contrary to what occurred during the Shurpin deposition. It was not the plaintiff who first referred to newspaper articles, but counsel for the Exchange asked Mr. Shurpin:

> "Did you read any newspaper articles that led you to think you had a lawsuit against anybody in connection with your account?" (page 82, lines 13-16)

On page 85 Mr. Shurpin stated that he had first heard that some of the 'big boys' at Weis had been transferred out of Weis prior to the SIPC liquidation while visiting a brokerage house prior to the Metz article's being published and the Metz article had merely confirmed what he had heard earlier.. Similarly, the defendants' attributing to Shurpin the alleged concession that the transfer of margin accounts was to lower the debts of Weis securities at the bank for which they cite Shurpin's testimony during his deposition (89) is completely misleading. On page 89 counsel for the Exchange asked

Mr. Shurpin:

> "From reading Mr. Metz' articles, did you ever get an understanding or explanation of why the accounts that were said to be transferred were selected for transfer?" (lines 12-15)

Shurpin replied that Metz' articles stated that the purpose of transfering large accounts had been to lower the debt of Weis securities at certain banks.

Conclusion

The court below erred in granting summary judgment to the defendants. The judgment of the court below should be reversed and the plaintiffs be permitted to have a jury determine all questions of fact in this case.

Respectfully submitted,

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Stuart A. Schlesinger
David Jaroslawicz

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS: 2nd Circuit

Index No.

RICH, et al,

Plaintiffs-Appellants,

- against -

Affidavit of Personal Service

NYSE, et al,

Defendants-Appellees.

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 18th *day of* February *19* 74 *at* *

deponent served the annexed Reply Brief *upon*

*

the *in this action by delivering* 7 *true copy* (es) *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 18th *day of* February *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1976

Victor Ortega

VICTOR ORTEGA

* Milbank, Tweed, Hadley & McCloy-1 Chase Man. Plaza, NY

* Finley, Kumble, Heine &ncUnderberg & Grutman-477 Madison, NY

* Rosenman, Colin, Kaye, Petschek, Freund & Emil-575 Madison-NY

* Mckerson, Kramer, Lowenstein, Nessen & Kamin-919 3rd Ave., NY

* Lee Feltman-295 Madison Ave., New York, New York

* Geist, Netter & Marks-276 Fifth Ave., New York